Supreme Court of Michigan.

CUDDY *v.* HORN.

The rule by which one who rides in a private conveyance is presumed to control, or be identified with, the driver, and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance.

The master of a vessel cannot relieve himself of responsibility for its safe management by surrendering its control to a charterer.

Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence.

Passengers on a steam yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its owners for injuries caused them by the negligent management of those in charge of it.

An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable, either jointly or severally.

If a passenger upon one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly, and it is for the jury to fix the liability where it belongs.

Where evidence tends to make out a case for the plaintiff, its force and effect is for the jury, and the Supreme Court will not attempt to review or weigh it.

The Limited Liability Act of Congress exempting ship-owners from personal liability for injuries caused by the negligence of those in charge of their vessels, does not apply to boats navigating streams connecting the great lakes.

ERROR to the Superior Court, Detroit.

Alfred Russell, *James Caplis*, *Henry M. Campbell* and *Henry M. Duffield*, for plaintiff in error.

Wisner & Speed, for defendant in error.

MARSTON, C. J.—The following statement of facts taken from the briefs of counsel for the defendants, is sufficiently full and accurate for a definite understanding and discussion of the legal questions raised. The action was commenced by the plaintiff, as administrator of the estate of John Kelley, deceased, to recover damages on account of his death caused by a collision between the steamer "Garland," of which the defendant, Horn, was owner, and the steam yacht "Mamie," owned by other defendants, on the Detroit river, July 22d 1880. The declaration alleged, in substance, that the "Garland" was going down the river upon a

pleasure excursion, and the "Mamie" was coming up, returning from a pleasure excursion, and that Kelley was a passenger on the "Mamie"; that by failure of the master of the "Garland" to keep a proper lookout, and by his failure to give proper signals at the proper time upon the approach of said "Mamie," as required by rule 3 for the government of pilots, and by reason of the failure of the master of the "Mamie" to give the proper signals to indicate upon which side she would pass until the vessels had approached so near that a collision was inevitable, and by reason of the failure of the owner and master of the "Mamie" to keep a proper lookout upon said "Mamie," said vessels collided, and said "Mamie" sank, causing the death by drowning of said Kelley.

The defendant, Horn, and the other defendants filed separate pleas of the general issue. The owners of the "Mamie" also filed a plea in abatement, alleging that proceedings had been commenced, and were then pending in the District Court of the United States by them as owners of the "Mamie," for the purpose of taking advantage of the statute of the United States limiting the liability of vessel owners in certain cases. And special notice of such proceeding was also given with the plea of the general issue.

A trial was had upon this plea, and a verdict, by direction of the court, rendered for the plaintiff thereon, and the trial thereupon proceeded upon the plea of the general issue, and a verdict was rendered in favor of the defendants. The case comes here on writ of error, and the points relied upon by the defendants will be considered in order.

The position taken by defendant, Horn, was, that the plaintiff's intestate was a passenger on the "Mamie" at the time of the alleged collision, and the "Mamie" having contributed to the collision, plaintiff's intestate must, in law, be held to have been so far identified with those in charge of the yacht, that he could not have recovered, if he had survived, for an injury suffered by him occasioned by such collision, and that, under the terms of the chartering or hiring of the yacht, he could not have recovered for an injury so received.

It appeared that Rev. A. F. Bleyenberg had chartered the steam yacht "Mamie," to carry a party of altar-boys and others, twenty-one in all, and fourteen of them from eleven to fifteen years of age, from Detroit to Monroe and back, for which he was to

pay $20; and that the yacht was in charge of the master and engineer thereof placed there by the owners. At the time of chartering the yacht it was stated that there would be about twenty persons to go on the trip, but no limit was placed upon the number or as to the route to be taken in going to and returning from Monroe.

It has not, and could not be claimed, that young Kelley had any authority or control whatever over the master or engineer of the yacht, or that he could have changed or directed the movements of the yacht in even the slightest degree. And while Father Bleyenberg, we may assume, could and did have charge of the yacht, as to the time of starting, the number of passengers and such like, yet, as to the due and proper management of the vessel, the steam she should carry, the speed at which she should be run, the course she should take within certain limits, the rules she should observe in meeting and passing other vessels, the lights she should carry, in a word, the laws and rules applicable to such crafts while navigating the rivers and lakes, were matters over which he could not rightfully be permitted to have any control or direction whatever. These were matters which the master of the vessel could not legitimately turn over to the guidance of any person who may have chartered the boat for a trip to and from a certain point. Had directions been given the master to run the yacht ashore, or upon a rock, or to run down upon and destroy a rowboat, or to not give and answer the necessary signals when approaching another vessel, or to not carry proper lights, clearly the master would have been under no obligations to obey such orders, and neither he nor the owners of the vessel could have justified such a departure from duty by setting up the authority or directions of Father Bleyenberg therefor. In this case it was the legal duty of the yacht to carry proper lights at night, and to give and answer certain signals in due and proper time when approaching another vessel, and what the law had thus directed to be done could not be varied, changed or controlled by any person who may have chartered the vessel for the occasion. And where a person can rightly have no voice or control, he cannot be held so identified with those in charge as to be considered a party to their negligence. It seems to me that any other rule could but point out the way to owners of vessels in which they could violate all rules and regulations adopted

to insure the safety of passengers without incurring any liability therefor.

The reason for holding a person riding in a private conveyance identified with the driver thereof, and, therefore affected by the negligence of the latter, cannot fairly be held applicable in cases like the present. In the case of a private conveyance the driver is under the direction and control of the passenger, and, if not, the latter may well decline to intrust his safety further in such conveyance. When, however, a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either, and whether he may have chartered such conveyance for a special purpose or not, yet for a faithful observance of the rules of law enacted for the running or navigation thereof, he cannot be held responsible in a case like the present, where the master is not his servant and is not subject to his direction or authority.

The authorities cited by counsel for plaintiff in error, and which decline to follow *Thorogood* v. *Bryan*, 8 C. B. 115, should be followed in the present case. The charterer in this case did not appoint the officers of the boat, but was himself, and those who accompanied him, under and subject to their power in the navigation of the vessel; and if they, thus controlling the movements of the "Mamie" while running, and representing the owners thereof, were guilty of negligence in the performance of their duties, those aboard have a remedy for injuries suffered in consequence thereof. See also *Covington T. Co.* v. *Kelley*, 36 Ohio St. 86.

It was next insisted that there was no joint liability on the part of the defendants. The question is not free from embarrassment, and upon a trial the danger is that each defendant is interested in endeavoring to throw all the blame upon the other, and perhaps attempt to prove acts of negligence not set forth in the declaration. In opposition to this, it may be said that negligence caused a collision by which plaintiff's intestate was killed, and that a remedy is given by statute to recover damages therefor; that if separate actions are brought different juries may acquit all the defendants, and thus the plaintiff be defeated, although his right to recover be unquestioned. When, therefore, such embarrassments are likely to arise upon the trial, and bearing in mind that the plaintiff is without fault and is entitled to recover—at least we must so consider in the discussion of this question—is not the plaintiff who

has thus suffered the wrong entitled to a remedy, and that the difficulties and dangers are to be thrown upon those presumably in the wrong, rather than upon him who was not in fault? If, in either view, injustice is likely to be done, should not the defend ants assume, or be charged with, the risk? Is there, however, likely to be any injustice done in holding them jointly liable? I think not. The facts are likely to be brought out in such a trial; neither will be interested in keeping back any thing tending to show that it was the other alone that was in fault; and we cannot assume that any wilfully false evidence will be given in the case. The facts are quite likely, therefore, to be fully presented to the jury, who can place the responsibility where it rightfully belongs, either by holding both liable or by holding one party liable and acquitting the other.

An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally. The injury done in this case resulted from a collision caused by the contemporaneous act of two separate wrongdoers, who, though not acting in concert, yet by their simultaneous wrongful acts put in motion the agencies which together caused a single injury, and for this the injured party could receive but a single compensation. It is a fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed. That rendered them jointly liable to the person injured, whether the act was done by the procurement of one person or of many; and if by many, whether they acted with a common purpose or design in which they all shared, or from separate and distinct motives and without any knowledge of the intention of each other, the nature of the injury is not in any degree changed or the damages increased which the injured party has a right to receive: *Stone* v. *Dickinson*, 5 Allen 30.

In *Colegrove* v. *N. Y. Cent. & Hud. River Railroad Co.*, 20 N. Y. 492, it was held that a passenger injured by a collision resulting from the concurrent negligence of two railroad corporations could maintain a joint action against both. *Cooper* v. *E. T. Co.*, 75 N. Y. 116, was a case where death had resulted from a collision by two vessels, and an action against both was maintained. In my opinion this action may be maintained against the owners of both vessels: *Hillman* v. *Newington*, 23 Albany Law Jour. 294.

It was next insisted that the case made by the plaintiff showed no fault or negligence on the part of the owners of the "Mamie" that would justify a verdict against them. The rule must now be considered as settled in this state, that where the evidence tends to make out a case for the plaintiff, the force and effect thereof must be submitted to the jury, and that this court will not attempt to review or weigh it.

In a case like the present it would be dangerous in the extreme for this court to attempt to find the facts or to draw inferences from the facts proven, or to attempt to say what might be considered an act of negligence or sufficient evidence thereof. In our opinion the case upon this point should have been submitted to the jury; and, in view of the fact that there must be a new trial, it is better that this court should not enter upon a discussion of the facts which lead us to this conclusion. It was also urged that this case came within the limited liability act of Congress, and that the defendants, owners of the "Mamie," were not personally liable. The learned judge before whom the case was tried held that the "Mamie" did not fall within the provision of the United States statutes, citing in support thereof *Am. Transp. Co.* v. *Moore*, 5 Mich. 368, and *The Mamie*, 5 Fed. Rep. 813. We are of opinion that these cases fully covered this question, and that the view taken by the court below upon this point was correct.

As we have thus passed upon all the material questions raised, and are of opinion that the court erred upon the questions designated, the judgment will be reversed, with costs, and a new trial ordered.

The other justices concurred.

It is undoubtedly the law that the contributory negligence of a servant will defeat the master's action for negligence against a third person: *Puterbaugh* v. *Reasor*, 9 Ohio St. 484; *Prideaux* v. *Mineral Point*, 43 Wis. 527.

The question is, what persons stand in such relations to the injured party that their negligence will be imputed to him? in other words, who are his servants? It will be attempted to answer this question:

I. As to public carriers. In *Thorogood* v. *Bryan*, 8 C. B. (M., G. & Scott) 115, Thorogood was a passenger in Barber's omnibus. He alighted from it without requiring it to be driven up to the curb and stopped. He was run down by a competing omnibus, owned by the defendant, for whom there was a verdict, on the ground that the failure of the driver to draw up to the curb and put plaintiff down was contributive negligence imputable to plaintiff whose servant the driver was held to be.

To the suggestion that a passenger in a public conveyance has no control over

the driver thus MAULE, J.: "But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost invariably brought against the rival carriage or vessel, which is only to be accounted for by that party spirit which more or less enters into every transaction of life. If there is negligence on the part of those who have contracted to carry passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say that although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust:" The other judges concurred. See to the same effect *Armstrong* v. *Lancashire Railroad Co.*, L. R., 10 Exch. 47; *Bridge* v. *Grand Junction Railroad Co.*, 3 M. & W. 244.

The same question came before the Supreme Court of Pennsylvania in *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151. Lichtenthaler was a brakesman upon coal cars, which, while running upon a railway, were derailed by running over an oil barrel negligently placed upon the track by defendant, Lockhart's, servants. The defendants set up the negligence of those in charge of the train as a defence. The court affirmed the rule, making liable the carrier, whose negligence concurred in causing the injury. "I do not think, however," said THOMPSON, J., "that the rationale of the principle that concurring negligence leaves the party to look to his own employee is satisfactorily expounded in the opinions of the judges in *Thorogood* v. *Bryan*, viz., the identity of the passenger with his own vehicle. I would say the reason for it is that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier as already noticed from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is, that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who, not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than its opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on to another, which he would assuredly do if temptation and opportunity offered. As this view best accords with the law, it is proof of the existence of the rule itself."

These are the leading decisions conflicting with the principal case. In

Thorogood v. *Bryan* the plaintiff got out of the stage in a crowded street without requiring the driver to stop or pull up to the curb. The decision might well have been grounded upon plaintiff's personal contributive negligence. It may be doubted whether even the English courts consider the question settled by this case, for it was decided upon a rule to show cause, a circumstance regretted by one of the judges, who said the subject was an important one and *ought to be definitively set at rest*. And see the disparaging criticisms of the rule in 1 Sm. Lead. Cas. 220. See also *Tuff* v. *Warman*, 2 C. B. N. S. 750; *Waite* v. *N. E. Railroad Co.*, El., B. & El. 728; *The Milan*, Lush. Adm. 388; 31 L. J. (P., M. & A.) 105. And the courts of New York, New Jersey, Kentucky and Wisconsin have dissented to it with great ability and vigor. See cases *infra*.

In affirming that the reason for the rule holding the carrier alone responsible is, that so to do will be an incentive to greater care and diligence, the Pennsylvania decision places the rule upon a much more solid foundation than if it be merely rested upon the legal fiction of identity of the passenger with the carrier. But where the concurring negligence is that of two carriers, care and diligence would be increased to a still greater degree by a rule making both liable jointly or severally.

But the Pennsylvania case seems to give only a partial adoption to the rule in *Thorogood's Case*. It holds that the negligence which would be a defence must be directly involved in the result; it must by itself, or concurring with the defendants, be the *proximate* cause of the death, and it is said that "running too rapidly on a road in bad repair, driving instead of drawing the train," would not, abstractly, be such negligence as would be a defence. To be such, the consequence of these acts, or some of them, must have directly entered into and become active agents in the very disaster itself: *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151, and see *Mann* v. *Wieand*, 4 Weekly Notes of Cases 6. In this case A. obtained permission to ride, and he did ride with B. C.'s dogs frightened B.'s team; it ran away; A. was thrown out and injured, and sued C. It was sought to impute the negligent acts of the driver to A. The court said: "But the husband (A.) had no control or authority over the driver; nor did the driver control the personal conduct of the husband. He, therefore, was not liable for the negligent conduct of the driver. * * * Nor is it any defence to the action that the injury was caused by the joint negligence of the driver and the plaintiff in error (C.) * * * Negligence, in a general sense, by the driver would not protect the plaintiff in error from liability for a direct and proximate injury caused by his own negligence."

With regard to goods, it is so established by the decisions, that the contributive negligence of the carrier bars an action by the owner against a third person whose concurrent negligence has also contributed to the injury. "There is no analogy between the cases in which passengers in one conveyance have been held entitled to an action against the owner of either or both of the vehicles, from the negligent management of which injury has been received. There is no bailment and no agency in those cases;" but as to goods the carrier is held to be "the bailee and *quasi* the agent of the shipper:" *Arctic Fire Ins. Co.* v. *Austin*, 69 N. Y. 471; and see *Vanderplank* v. *Miller*, 1 Moody & Malkin 169; *Simpson* v. *Hand*, 6 Whart. (Pa.) 311; *Duggins* v. *Watson*, 15 Ark. 118; *Transfer Co.* v. *Kelly*, 36 Ohio St. 86; *Smith* v. *Smith*, 2 Pick. 622."

Dissenting from the rule laid down in *Thorogood's Case*, are the following decisions: *Bennett* v. *New Jersey Railroad &*

T. Co., 36 N. J. L. 225. A passenger in a horse car was injured in a collision caused by the carelessness of the engineer of a locomotive owned by the railroad company defendant. The company set up contributory negligence by the horse car driver as a defence. Said BEASLEY, C. J., "The proposition claimed to be law is, that when a passenger enters a public conveyance, he, in some sort, becomes affected by the negligence of the agents of those in charge of such conveyance, at least to the extent of debarring him from suits against third parties for injuries occasioned by the joint carelessness of such third parties, and that of the servants having the control of the vehicle in which he is riding."

The position has for its support the case of *Thorogood* v. *Bryan*, 8 Mann., Gr. & Scott 116. The authority is in every respect in point. * * * The reason given for the judgment is, that the passenger in the omnibus must be considered as identified with the driver of the omnibus in which he voluntarily becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way, that is by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly imply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car, in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger, and so on the same ground each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes, and yet it is to be presumed that no court would go this length and impose on each person being carried by a railroad train responsibility for the misconduct of the engineer or conductor of such train. The doctrine of the English case appears to convert the driver of an omnibus into the servant of the passenger, for the single purpose of preventing the passenger from bringing suit against a third party, whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent to such a proposition. Under the circumstances in question, the passenger is a perfectly innocent party having no control over either of the wrongdoers, and I can see no reason why, according to the usual rule, an action will not lie in his behalf against either or both of the employers of such wrongdoers."

Webster v. *Hudson Railroad Co.*, 38 N. Y. 260. In this case, HUNT, C. J., speaking of the passenger injured, said: "Like every passenger in a train of cars propelled by steam he was passive in the hands of the railroad company; unable to aid if aid was useful; unable to delay or hasten a train; incompetent

and not permitted to regulate or examine its machinery. His personal safety was entirely under the control of others. * * * The imputation to the plaintiff of the negligence of another is based upon no sound principle."

And to the same effect see *Chapman* v. *New Haven Railroad Co.*, 19 N. Y. 341; *Brown* v. *N. Y. C. Railroad Co.*, 32 N. Y. 597; *Sheridan* v. *Brooklyn, &c., Co.*, 36 N. Y. 39; *Colegrove* v. *New York, &c., Co.*, 20 N. Y. 492; *Barrett* v. *Third Avenue Co.*, 45 N. Y. 629. In Kentucky, see to the same effect *Danville, &c., Co.*, v. *Stewart*, 2 Metc. 119; *Louisville, &c., Co.* v. *Case*, 9 Bush 728. In Wisconsin, see *Prideaux* v. *Mineral Point*, 43 Wis. 513. In Ohio, see *Transfer Co.* v. *Kelly*, 36 Ohio St. 86; and see *Perry* v. *Lansing*, 24 N. Y. S. C. (17 Hun) 34; *Hillman* v. *Newington*, California 1880, 23 Alb. L. Jour. 294; *Cooper* v. *Eastern Tr. Co.*, 75 N. Y. 116; *Otis* v. *Thom*, 23 Ala. 469.

II. As to Private Carriers.

Robinson v. *N. Y. Central, &c., Railroad Co.*, 66 N. Y. 11, was the case of "a gratuituous ride by a female upon the invitation of the owner of a horse and carriage." She was injured by a collision with a train upon defendant's road. Said Church, C. J.: "Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Coulon's negligence to her.

"If his negligence contributed to the injury, he is liable also to an action, but that does not exonerate the defendant. Suppose Coulon had, by grossly negligent driving, turned over the carriage and injured the plaintiff, is there a doubt but he would be liable to an action for the injury in her behalf. These views proceed, of course, upon the assumption that there was no relation of principal and agent, or master and servant. Nor were they engaged in a joint enterprise in the sense of mutual responsibility for each others acts, as in *Beck* v. *East River Ferry Company*, 6 Robertson 82."

In the case here alluded to, a party in a row-boat were run down by a steamboat, against whose proprietors an action was brought by the representatives of one of the men who was drowned. The court said: "The deceased was undoubtedly chargeable with any neglect of his comrades, as well as his own, to do every act to avoid danger and insure safety, at least, unless he did all he could to repair the deficiency. None of them stood in the light of either employer or employed to the other; it was a joint expedition in which each was liable for the acts and omissions of the other, unless he took some separate step to repair or prevent the result of the negligence of the others: *Beck* v. *East River Ferry Company*, 6 Robertson (N. Y.) 82. This case certainly is distinguishable from *Robinson* v. *N. Y. Central, &c., Railroad Co., supra*, in this: Joint enterprisors have an authoritative voice, and speak of right in the management and control of the enterprise—and have control to a greater or less extent, may reasonably be held responsible for bad management. On the other hand, a lady or any other guest in a carriage cannot direct its management and movements of right and with power to enforce his or her commands. Any con-

trol over it which the guest may exercise, is only by the courtesy and consent of the owner. The view of the court in *Robinson* v. *N. Y. Central, &c., Railroad Co.* is sustained in *Knapp* v. *Dagg*, 18 How. Pr. 165; *Metcalf* v. *Baker*, 11 Abb. Pr. (N. S.) 431; *Dyer* v. *Erie Railway*, 71 N. Y. 228.

But the distinction between *Beck's Case* and *Robinson's Case*, *supra*, taken by the New York court has not been perceived in all courts. Thus in *Prideaux* v. *Mineral Point*, 43 Wis. 529, Mr. Chief Justice RYAN said: "It is difficult to comprehend the distinction. The court says that it was the case of a gratuitous ride, by a female upon the invitation of the owner of a horse and carriage. Doubtless; but there is the same mutual agreement of two to travel together as of the several to sail together, in *Beck* v. *Ferry Co.* These were in contemplation of law as much in the same boat as those. A woman may and should refuse to ride with a man, if she dislike or distrust the man, or his horse, or his carriage. But if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but as to third persons, the man is her agent to drive her —she takes man, horse and carriage for the jaunt, for better, for worse." And again (p. 528): "One voluntarily, in a private conveyance, voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumed the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. When *pater familias* drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence.

It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust, each in the discretion of each, against negligence affecting the common safety. One enters a public conveyance in some sort of moral necessity. One generally enters a private conveyance of free choice; voluntarily trusting to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance, trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of everything, except that which is most immediately important to himself; and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels, nothing to the care or skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law, accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view. The negligence of the driver was held imputable to the woman in this case: *Prideaux* v. *Mineral Point*, 43 Wis. 513, affirmed in *Otis* v. *Janesville*, 47 Id. 422. See also, *Houfe* v. *Fulton*, 29 Id. 296; s. c. 34 Id. 608; *L. S. & M. S. Railroad Co.* v. *Miller*, 25 Mich. 274.

The true view appears to be this: the passengers in any conveyance, whether carriage or boat, may be joint enterprisors, and as such, jointly in control of the conveyance, and jointly and severally chargeable with each other's mismanagement. Again, some of the

passengers may be guests of those in charge of the conveyance. Having no control over the management of the conveyance, guests are not imputable with their negligence. Lastly, passengers may, as to some persons in the conveyance, hold the relation of master and servant. Having control over such persons, their negligence is imputable to the passengers. To illustrate: Two young men together hire a carriage and driver, in which to ride, accompanied by two ladies. The ladies are guests, and, except by courtesy, have no control over either young men or driver, whose negligence is therefore not imputable to them. The driver is the servant of the young men. They may control his actions, hence they are responsible for his want of care. The young men are joint enterprisors, and as such, each is responsible for the other's carelessness.

As to officers and employees of public carriers, they appear, from the ablest and preponderating authorities, not to be servants whose negligence is imputable to passengers. As to private carriers, the question appears to be largely one of evidence. If the facts show the relation of joint enterprisors, or of master and servant, then the negligence of a joint enterprisor, or of a servant, is imputable to the other joint enterprisors, or to the master. But the writer inclines to the view that a mere guest is not a master or a joint enterprisor. Surely, a guest ought not to be made responsible for the actions and negligence of those over whom he has no control.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Illinois.

THE WASHINGTON ICE CO. *v.* SHORTALL.

Grants of land bounded on rivers or upon the margins above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the margin. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it, and this title to the middle of the stream includes the water, the bed and all islands.

When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the stream, and he has the right to prevent its removal.

The measure of damages for cutting and removing ice under such circumstances is the value of the ice as soon as it exists as a chattel, that is, as soon as it has been scraped, ploughed, sawed, cut and severed, and is ready for removal.

ACTION of trespass *quare clausum fregit*, brought in the Circuit Court of Cook county, by Shortall, against the Washington Ice Company, for cutting, removing and appropriating, in January and February 1879, a quantity of ice which had formed on the bed of the Calumet river, within the limits of plaintiff's land in Cook county.

Defendant pleaded the general issue and *liberum tenementum*.

On the trial, the patent from the United States to Laframbois